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"HANDOUTS AND PAYBACKS: REMEDIES FOR PAYMENTS MADE TO THE WRONG PARTY"

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I. Introduction.

The September 15, 2016 *Corban* rulings[1] marked a paradigm shift in how practitioners, landowners, and natural gas companies will forever approach the "DMA[2] problem." Settling heated debates on concepts such as "rolling v. fixed" and "automatic abandonment," the recent Supreme Court rulings will force landowners and operators to question the validity of their oil and gas lease when confronted with unresolved oil and gas severances lurking in the historic chain of title.

No longer can civilians take pride in having "deemed abandoned" an ancient, lapsed, and unused severed mineral interest. Like Moses on the hilltop, landowners across Ohio had applied a matrix of if-then statutory tools to lay claim to hundreds and thousands of mineral acres to justify the leasing of the "re-claimed" interests to the gas companies. With *Corban*, those rights have now potentially floated away.

Gas companies, in a scrum to secure lucrative leaseholds, also had to take action or potentially lose a foothold to a competitor. Operators needed to build units, not fund landowner litigation. Acting under the then-existing rule of law as determined by the appellate courts, operators sought to maximize efficient leasing efforts and minimize legal entanglements. An unused mineral severance from 1925 with no savings event prior to June 30, 2006? Check. No production? Check. No separate mineral tax assessment? Check. No title transactions? Check. A series of questions, if answered in the negative, reduced risk. Gas companies, like the public policy of Ohio, employ a natural bias for action: to produce abundant natural resources (in an environmentally responsible manner). In that regard, landowners were not alone when they took to the hilltop, but were joined by operators alike, who all in one voice "deem abandoned" the

[1] *Corban v. Chesapeake Exploration, L.L.C.*, 2016-Ohio-5796 (Ohio Supreme Court, September 15, 2016), see also, *Walker v. Shondrick-Nau (Noon),* 2016-Ohio-5793 (Ohio Supreme Court, September 15, 2016).
[2] Ohio's Dormant Mineral Act, codified in O.R.C. § 5301.56.

severed interest. Operations began under the protective cloak of the prevailing view of the appellate courts. Some operators "hedged their bets" undertaking efforts to secure protective leases from the heirs of the original, severing parties. Now those operators may have to fund thousands of protection leases to remain vested in the leasehold.

Nonetheless, the September 2016 rulings by the Supreme Court simplified the "choose your own adventure" of DMA analysis. First and foremost, civilians may not "deem abandoned" any interest - at least not with the force of law behind it. Inactivity only leads to a conclusive presumption of lapse. Should a factual foundation be laid out by a surface owner in the context of a declaratory judgment proceeding or quiet title action *prior to June 30, 2006*, we now know that only a judge wields the force of law to "deem abandoned" a severed interest. If no such proceeding took place, surface owners are left to the statutory remedies of the 2006 version of the DMA.

Teetering in the balance, however, is a modern day oil and gas lease. Lessors must now fulfill a duty to defend and confirm title, assuming that same lease is not void *ab initio*. Lessors must pursue the remedies under the 2006 version of the DMA, engage in a good faith search[3] of the heirs of the ancient owners to provide notice of intent to declare abandonment, only then potentially triggering an avalanche of preservation notices by the various heirs. But suppose a surface owner engages in the requirements of the 2006 version of the statute only to be faced with a preservation notice in reply? At that point, what is the legal status of his lease with the gas company? If the oil and gas are still vested in the heirs of the original severing parties, what does that mean for the lessor? And from the operator's perspective, does the lease mean anything? Have you leased the right party?

II. Scope.

This paper explores some well settled legal concepts governing the rights and remedies of parties to contracts (in this case, oil and gas leases) that may or may not have been valid from the start. An operator left holding a contested lease may be forced to explore equitable concepts and remedies for relief, such as void v. voidable contracts, mutual mistake of fact, mutual mistake of law, quasi-contract, restitution and rescission. This paper further explores the viability of claims for breach of contract to the extent a court determines equitable relief is not appropriate. Our discussion will include examination of how other producing jurisdictions handle a failed oil and gas lease. For example, Oklahoma statutes and the Louisiana Mineral Code provide statutory mechanisms for operators to rescind leases taken with the wrong party, and a means to recover all monies paid. However, an operator's right, if any, to recover payments already made under a lease will assuredly be more nuanced in Ohio. Importantly, this paper does not constitute legal advice nor do the authors hold this examination out as an all-inclusive playbook, for either landowner or operator. The authors intend this review as a preliminary exploration applying only *some* of the well settled contractual and equitable concepts to the scenario of a failed oil and gas lease in Ohio.

[3] A discussion on the level and degree of search that a surface owner must undertake to comply with the 2006 DMA will likely be further determined by additional litigation.

III. The Long Road of Walking Back a Lease.

A. A Prototypical DMA Scenario Resulting in Divestiture.

In an effort to provide a foundation for the legal and equitable principals laid out below, we begin our discussion with what a typical DMA problem may present. We use the below hypothetical facts to demonstrate a practical application of those principals. Outside counsel and in-house land departments frequently encounter the following hypothetical fact pattern:

- By deed dated January 1, 1926, John Smith and Mary Smith, his wife, conveyed 10 acres (in Belmont County) to Jane Doe, unmarried, her heirs and assigns, ***excepting and reserving the oil and gas (the "Smith Interest").*** A review of the chain of title for the 10 acres reveals:

  (i) no subsequent oil and gas leases as to the Smith Interest;

  (ii) no separate mineral tax assessment;

  (iii) no separate mineral conveyances as to the Smith Interest;

  (iv) no intestate/testate transfers recorded in the county as to the Smith Interest;

  (v) no quiet-title or declaratory judgment actions filed by the Lessor as to the Smith Interest; and,

  (vi) no known production of minerals relating to the Smith Interest.

- In 2014, the current owner ("Lessor") of the 10 acres enters into a paid-up oil and gas lease with Operator Energy Corporation ("Operator") with a 5 year primary term. Operator tenders $5,000 per acre for the "bonus" payment.[4]

- Based on the state of the law at the time, Operator did not enter into a protective lease with the heirs and/or assigns of John and Mary Smith on the basis that the appellate courts in *Eisenbarth*[5] and *Walker*[6] had held that the 1989 DMA was self-executing resulting in the Smith Interest automatically lapsing as of March 22, 1992, at the latest.

[4] The term "bonus payment" as used in this paper, shall mean the consideration paid to the lessor to ensure that no further delay rental or delay in marketing payments are due to lessor during the primary term of the lease, and that any and all bonuses and delay rentals due or payable under the lease, have been prepaid to lessor for the purpose of keeping the lease in effect during and for the entirety of the primary term. Therefore, we do not discuss the implications that a "bonus payment" made only as an enticement for execution of a lease may have on a court's consideration of the potential claims discussed herein.

[5] *Eisenbarth v. Reusser*, 2014-Ohio-3792, 18 N.E.3d 477 (Ct. App. 7th Dist.).

[6] *Walker v. Shondrick-Nau*, 2014-Ohio-1499 (Ct. App. 7th Dist.).

- On September 15, 2016, Operator notifies Lessor of the outstanding Smith Interest, who then complies with the procedures of the 2006 DMA, described below, only to be confronted with a "Notice of Preservation" by an heir to the Smith Interest.

- On September 16, 2016, Snakeoil Energy Partners, LLC ("Snakeoil") enters into an oil and gas lease with the heirs to the Smith Interest.

Under the 1989 version of the DMA (the "1989 DMA")[7], any "mineral interest" [other than coal] held by any person, other than the owner of the surface of the lands subject to the interest, may be deemed abandoned by a court of competent jurisdiction if certain facts are proven in an action to quiet title or seeking declaratory judgment.[8] For cases filed under the 1989 DMA (prior to June 30, 2006, being the effective date of the 2006 amendment to the 1989 DMA), a common pleas court could vest in the owner of the surface, and declare a prior severance abandoned (viz, "deem abandoned"), if a preponderance of the evidence establishes no "savings event" occurred within the twenty (20) year look-back period preserving the severed interest. Savings events under the 1989 DMA include (i) the recording of a title transaction, (ii) actual production of the mineral, (iii) underground storage, (iv) obtaining a permit for extraction of the mineral, (v) filing a claim of preservation, or (vi) obtaining a separately listed tax parcel number for the mineral interest.[9] The Supreme Court held in the *Corban* case that the 1989 DMA *is not self-executing*, but merely creates a presumption of lapse, and that a Lessor must assert a claim to minerals by pursuing a quiet title action or declaratory judgment prior to the effective date of the 2006 DMA.

The 2006 DMA[10] differs from the 1989 DMA by promulgating a notice procedure prior to a severed interest lapsing, rather than relying on "automatic abandonment" for marketability. Specifically, under the 2006 DMA, after a 20 year period of dormancy, a surface owner must follow a regime of procedures, including giving notice to the holder(s) of the severed mineral interest and filing an Affidavit of Abandonment, in order to claim a severed mineral interest has been abandoned, and filing a final "notice of failure to file." However, as supported by another recent Supreme Court ruling in *Dodd v. Croskey*, the 2006 DMA further provides that the holder of the severed mineral interest may file a claim to preserve the mineral interest as a method to interrupt any period of dormancy *or* as a response to a notice regarding abandonment.[11]

Under the above statutory framework, as determined by *Corban*, the Smith Interest would be subject to the 2006 DMA on the basis that no judicial determinations declaring abandonment exist of record prior to June 30, 2006. Further assuming in our prototypical DMA scenario, Lessor has attempted to declare abandoned the Smith Interest by complying with the procedures of the 2006 DMA. Under O.R.C. 5301.56(E), "before a mineral interest becomes vested under division (B) of this section in the owner of the surface of lands subject to the interest" Lessor must "(1) serve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned."

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[7] Ohio's Dormant Mineral Act codified in O.R.C. § 5301.56, eff. March 22, 1989.
[8] O.R.C. 5301.56(B). See also *Corban, supra*.
[9] *See*, *Walker*, *supra*.
[10] Amendment to the 1989 DMA , O.R.C. §5301.56 effective June 30, 2006 (the "2006 DMA").
[11] 2015-Ohio-2362 (June 18, 2015).

In response to the efforts of Lessor in our scenario, however, heirs to the Smith Interest filed notices preserving their interest in the Smith Interest and leased the collective Smith Interest to a competing oil and gas company, Snakeoil. Based on the filing of the preservation notices and leases to Snakeoil, Lessor has effectively (i) been divested of any interest in the oil and gas; (ii) the lease to Operator is in peril of being set aside and/or divested; and (iii) the bonus payment of $50,000 to Lessor, under *Corban*, may have secured nothing.

B. Potential Claims.

(i) Void vs. Voidable Contracts.

As a threshold matter, an oil and gas lease is a contract in Ohio. In *Harris v. Ohio Oil Co.*, the Ohio Supreme Court stated that "the rights and remedies of the parties to an oil or gas lease, must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another form. Such leases are contracts, and the terms of the contract with the law applicable to such terms, must govern the rights and remedies of the parties."[12] A contract is generally defined "as a promise, or a set of promises, actionable upon breach" including several essential elements, including "an offer, acceptance, *contractual capacity*, consideration, a manifestation of mutual assent and legality of object and of consideration."[13]

Since an oil and gas lease lives in the world of contracts, can one be set aside as a nullity? If the Lessor from our hypothetical DMA problem above is determined not to be the owner of the oil and gas at the time he entered into the lease with Operator, he may have lacked the "contractual capacity" to lease the oil and gas rights. The sole purpose of an oil and gas lease is to permit the lessee to develop the oil and gas, a right that Lessor after-the-fact, may have lost. Operator may seek to rescind the lease as void and be restored to its former rights or to affirm its lease and enforce it by the recovery of damages for its breach. But Operator cannot seek to affirm the lease and make claims for breach, *and* set it aside as a nullity, unless, potentially, the claims are asserted in the alternative.[14]

If a contract is *void*, the entire transaction is regarded as a nullity, as if no contract existed between the parties. A *voidable* contract operates as a valid contract, unless and until one of the parties takes steps to avoid it. Though determining whether an oil and gas lease is void, or only voidable, may itself not answer the question as to whether an operator may recoup a bonus payment, it is a necessary step in determining the applicability of some potential methods of recoupment which may come into play (and are discussed throughout this paper). Unfortunately, however, the "distinction between void and voidable is not as distinctly defined as could be wished."[15] Perhaps the clearest scenario to approach the distinction is to consider contracts executed by minors.

In *Harner v. Dipple*, the Ohio Supreme Court examined a contract executed by an minor, under the guiding principal that "the law grants to infants immunity from liability on their

[12] 57 Ohio St. 118, 129 (1897).
[13] *Williams v. Ormsby*, 131 Ohio St. 3d 427 (2012).
[14] *See, e.g.,Trimble v. Doty*, 16 Ohio St. 118 (1865).
[15] *Arnold v. Fuller's Heirs*, 1 Ohio 458, 467 (1824).

contracts" such that the contract is null and void at the election of the minor, but may be made good by ratification once the infant reaches the age of majority. [16] A contract by a minor may be found void on the basis that the "immunity is intended for their protection against imposition and imprudence."[17] However, if after reaching the age of a majority, the party ratifies and confirms the contract, then the ratification becomes a "valid and binding engagement."[18]

In *Buchanan Bridge Co. v. Campbell*, the Ohio Supreme Court held that contracts made with political sub-agencies of the State of Ohio must be in conformance with the applicable statute or they are void, not merely voidable.[19] "Whatever the rule may be elsewhere, in this state the public policy, as indicated by our constitution, statutes and decided cases, is, that to bind the state, a county or city for supplies of any kind, the purchase must be made substantially in conformity to the statute on that subject, and that contracts made in violation or disregard of such statutes are void, not merely voidable, and that courts will not lend their aid to enforce such a contract directly or indirectly, but will leave the parties where they have placed themselves."[20]

In its pure definition, a void contract is "a contract that is of no legal effect, so that there is really no contract in existence at all."[21] A contract for the sale of illegal drugs is an example of a void contract; it cannot be enforced by either party. A contract that is void *ab initio* is one that is "null from the beginning, as from the first moment when a contract is entered into. A contract is void *ab initio* if it seriously offends law or public policy . . ."[22]

Operator may make the claim that the lease is void from its inception because it is a contract of no legal effect. The Lessor has purported to lease oil and gas rights he does not own such that there is really no contract in existence at all. The agreement is a nullity or a fiction, but entered into in good faith. Operator is not even holding a "top lease." Lessor simply does not own the oil and gas and Operator has no right to develop.

(ii) Voidable Contracts based on Mistake of Law and Fact.

Voidable contracts require one of the parties to make an argument. The second potential claim and remedy for Operator is an effort to prove and argue mutual mistake of fact to render the agreement voidable. In that context, both Operator and Lessor, in good faith, believed that the oil and gas were indeed vested in Lessor in accordance with the current application of the 1989 DMA as determined by the appellate courts in *Walker* and *Eisenbarth,* both of which were controlling in Belmont County at the time. After September 15, 2016, that belief was eviscerated. At best, Lessor owns a contingent right to the oil and gas upon his successful completion of the 2006 DMA, which, in the example fact pattern offered above, proved unsuccessful. Nonetheless, the basis for the bargain in making the lease was both Lessor's and Operator's good faith belief that Lessor was vested with the oil and gas. Only after the fact,

[16] 31 Ohio St. 72 (1876).
[17] *Id*.
[18] *Id.*
[19] 60 Ohio St. 406, 420 (1899).
[20] *Id.*
[21] *Void Contract*, Black's Law Dictionary, (10th ed. 2014).
[22] *Void Ab Initio*, Black's Law Dictionary, (10th ed. 2014).

based on a *retuning* of application of DMA, was Lessor stripped of his interests, as the Smith heirs preserved their rights.

Under the Second Restatement of Contracts, as adopted by the Supreme Court in *Reilly v. Richards*, *infra*, if in the presence of a mistake by both parties as to a basic assumption on which the contract was made has a "material effect" on the agreed exchange of performances, the contract is voidable:

> Before making a contract, a party ordinarily evaluates the proposed exchange of performances on the basis of a variety of assumptions with respect to existing facts. Many of these assumptions are shared by the other party, in the sense that the other party is aware that they are made. The mere fact that both parties are mistaken with respect to such an assumption does not, of itself, afford a reason for avoidance of the contract by the adversely affected party. ***Relief is only appropriate in situations where a mistake of both parties has such a material effect on the agreed exchange of performances as to upset the very basis for the contract***). [23]

In Ohio, generally, the doctrine of mutual mistake permits rescission of a contract when the parties' agreement is based upon a mutual mistake of either law or fact.[24] In the case of our hypothetical, Operator can argue that the mistaken mutual belief that the Smith Interest had become automatically abandoned in favor of Lessor constitutes the type of adverse "material effect" on the agreed upon exchange of performance so as to upset the very basis for the contract. The fundamental purpose of an oil and gas lease is to permit the lessee to develop and produce oil and gas owned by the lessor. The parties mutually assume that the lessor owns the oil and gas and the right to lease. Lessor agreed to let exclusively to Operator the oil and gas underlying the 10 acres. Operator agreed to make payment and develop the oil and gas, which results in future economic benefits for both the Lessor and Operator. Both Lessor and Operator, after having agreed on the exchange of performances, come to learn that the oil and gas is now owned by another party, the Smith heirs.

Generally, in Ohio, the "doctrine of mutual mistake entitles a buyer to rescission of a real estate purchase contract where there is a mutual mistake as to a material part of the contract and where the complaining party is not negligent in failing to discover the mistake."[25] The question of degree of materiality of mistake is measured by whether the mistake has bearing on the essence of the agreement such that the "intention of the parties must have been frustrated by the mutual mistake."[26]

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[23] Restat 2d of Contracts, 152 (2nd 1981) (emphasis added).

[24] *State ex rel. Walker v. Lancaster City School Dist. Bd. of Edn.*, 79 Ohio St.3d 216, 220 (1979); citing *Firestone Tire & Rubber Co. v. Central Nat'l Bank*, 159 Ohio St. 423, 435 (1953) ("The generally accepted test which determines whether a recovery may be had is whether the defendant, in equity and good conscience, is entitled to retain the money to which the plaintiff asserts a claim…[t]he fact that one to whom money was paid by mistake used no deceit or unfairness in obtaining it, but acted in good faith, will not preclude recovery in an action for money had and received").

[25] *Markel v. Wright*, 5th Dist. Coshocton No. 2013CA0004, 2013 Ohio 5274, ¶ 28, citing *Reilley v. Richards*, 69 Ohio St. 3d 352, 632 N.E.2d 507 (1994).

[26] *Reilly*, at 69 Ohio St. 3d, at 353.

The Supreme Court in *Reilley* adopted the rule stated in Section 152(1) of Restatement (Second) that provides "where a mistake of both parties at the time of a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of mistake under the rule stated in [section] 154." The circumstances under which a party bears the risk of mistake are:

> (a) the risk is allocated to him by agreement of the parties, or
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> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or,
>
> (c) the risk is allocated to him by the court on the grounds that is reasonable in the circumstances to do so."[27]

Significantly, in Ohio, "the risk of mistake is placed on the seller of real estate to know the title and estate that the seller can furnish" and in the presence of mutual mistake, "the contract is voidable by the adversely affected party."[28] The test of the right of recovery of money paid under mistake of fact is whether the "payee has a right to retain the money * * * [i]f the money belongs to the payer and the payee can show *no legal or equitable right* to retain it he must refund it."[29]

The mutual mistake in our hypothetical borders on both a mistake of fact and a mistake of law. The parties later became mistaken in their analysis of the law, but were not mistaken at the time of contract formation. The mistake in law resulted in the parties *later* becoming mistaken as to the ownership of the oil and gas, a fact material to the agreement. A mistake of law occurs when a "person truly acquainted with the existence or nonexistence of facts but is ignorant of or comes to an erroneous conclusion as to their legal effect."[30] Here, Operator is more appropriately considered the "adversely affected party" because it has already paid value to Lessor in the form of the bonus ($50,000) as inducement to secure oil and gas rights it intended to develop, not anticipating a change in the law. Generally, a "mistake of the law is not grounds for relief by reformation or rescission of a contract" if at the time of contract formation "the intentions of the parties were fully carried out at the time of contract."[31]

Operator is left to argue that under a mistake of law theory, the intentions of the parties could not have been fully carried out at the time of contract formation because the parties *later* became mistaken as their understanding of the 1989 DMA, as determined in *Corban.* Whatever the "intentions of the parties" were at the time the lease was made are moot.

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[27] *Id.*
[28] *Jackson v. Force*, 2014-Ohio-3167, ¶¶ 34, 35 (2nd Dist. 2014).
[29] *See, e.g.*, *Motorists Mut. Ins. Co. v. Columbus Fin., Inc.*, 168 Ohio App. 3d 691, 2006-Ohio-5090, ¶ 15 (emphasis added).
[30] *Harville v. Franklin*, 1991 Ohio App. LEXIS 3515 (12th Dist. 1991) (*aff'd, Harville v. Franklin* (1991), 1991 Ohio LEXIS 2767).
[31] *Id.*

The question then becomes, who between Operator and Lessor was in the better position to avoid the effect of a wrong conclusion in the law? Even though *Corban*, *Eisenbarth*, and *Walker* were appealed to the Supreme Court, wouldn't the parties be reasonably secure in hanging their hats on the analysis and decisions of the appellate court at that time? In that regard, risk of a change in the law seems equally allocated to Operator as a sophisticated corporate entity, and the Lessor, who is charged to know "the title and estate that the seller can furnish," *especially if the Lessor gave a general warranty of title*, discussed below.

In Ohio, "the tendency of the courts is to treat mistakes as to legal rights as mistakes of fact, or *mistakes of mixed fact and law*, wherever it is possible, to do so without disturbing well-settled precedents."[32] In deciding who was in the better position to foresee a change in the law, neither the Lessor nor Operator held any particular advantage. "If loss or prejudice must be sustained by one of them, and it appears that the parties were equally well placed to *foresee and prevent* the harmful situation from arising, relief will not be granted; but where the evidence shows that the complaining party did not have the same opportunity as did his opponent to anticipate and avert the dilemma, relief will be granted . . .".[33] In the context of a change in the application of the 1989 DMA, neither Operator nor the Lessor held some advantage over the other as to how the Supreme Court may rule on *Corban*, and related cases, overturning what had become years of accepted understanding of the interplay between the 1989 and 2006 DMA. Neither party was equally well placed to foresee or prevent the coming sea-change in the law.

Several Ohio courts have held that the "doctrine of mutual mistake permits rescission of a contract when the parties' agreement is based upon *a mutual mistake of either law or fact*."[34] If successful in presenting a claim for mutual mistake of fact or law, the hypothetical oil and gas lease appears voidable by Operator, unless the Lessor can show that Operator bore the risk of mistake. Assuming the risk of mistake is equally allocated to both parties, and a court decides to set aside the lease, we now turn to defenses to enforcement, discharge, and remedies.

(iii) Quasi-Contract Claims.

If a court has determined that the lease executed by the parties is void or otherwise no longer in effect, an operator's attempt at recoupment may be limited to non-contract or quasi-contract remedies. For these remedies, the operator would essentially claim that, under the circumstances, their counterpart has received something of value but have returned nothing of value, entitling the operator to restitution. As described below, restitution is generally available under claims of quasi-contract and unjust enrichment, allowing a party to reacquire the value of the benefit or payment they have expended. However, successfully arguing these claims will undoubtedly come with challenges.

When a party obtains a benefit under a contract, they are likewise required to return a benefit to the other party. Similarly, where a contract sets forth what is to happen in the event of

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[32] *Thoresen v. Bd. Of Trustees*, No. 82-CA-108, 1983 Ohio App. LEXIS 12254 (7th Dist. 1983).
[33] *Id.* at *13.
[34] *Jackson v. Force*, 2014-Ohio-3167, ¶¶ 34, 35 (2nd Dist. 2014); citing *Weber v. Budzar Indus.*, 2005-Ohio-5278, ¶ 34 (11th Dist. 2005); and *Fox & Lamberth Ents., Inc. v. Craftsmen Home Improvement, Inc.*, 2006-Ohio-1427, ¶ 62 (2nd Dist. 2006).

breach or an inability to perform, courts will apply those terms over more general contract law.[35] Where a formal or express contract does not exist, or where only an unenforceable or void agreement existed, there may be instances where a court would determine that such an exchange of benefits or intended exchange of benefits was not gratuitous. These instances are typically known as contracts implied in law or quasi-contracts. While these scenarios typically lack the "meeting of the minds" present in express or implied in fact contracts, they still present facts where one party confers a benefit upon another in a way which imposes or implies the obligation to reciprocate.[36] When this reciprocation does not occur, the law finds that the party has been unjustly enriched. The party who failed to reciprocate now holds a benefit, something of value, to which they are not justly entitled.[37] In an early Ohio Supreme Court decision on the matter, the Court stated that, "unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another."[38]

When unjust enrichment occurs in a quasi-contract situation, the common law remedy of restitution is generally appropriate. "The purpose of the quasi-contract action is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant. Thus, while equity might compel a return of the article involved, the obligation which is recognized and enforced in law is the obligation to pay the reasonable worth of the benefit received."[39] In a situation where the benefit was monetary, restitution generally amounts to a refund. This puts the paying party back in the same position they would have been if the parties had never entered into the quasi-contract at all.

Quasi-contract and the remedy of restitution may even apply where the statute of frauds might otherwise prevent a party from enforcing an unwritten agreement.[40] However, the elements of quasi-contract must be affirmatively pled and shown in order to obtain relief.[41] There are three elements which must be shown for a court to find that a quasi-contract exists and that the plaintiff is entitled to restitution. First, there must have been a benefit or payment made by the plaintiff to the defendant. Second, the defendant must know of the benefit of payment. Third, the defendant is unjustly enriched by the benefit or payment and/or from retention thereof.[42] The statute of limitations for a quasi-contract is six years after the cause of action accrued.[43]

Relevant examples in Ohio of the concepts described above include the case of *Sammartino v. Eiselstein*.[44] In *Sammartino*, a buyer paid a $2,000.00 deposit towards the purchase of a piece of real property, but subsequently changed his mind about the purchase, claiming he could no longer afford it.[45] The seller refused to return the deposit and the buyer

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[35] *Saraf v. Maronda Homes, Inc.*, 2002-Ohio-6741 (Ct. App. 10th Dist.).
[36] *Hummel v. Hummel*, 133 Ohio St. 520, 525, 14 N.E.2d 923 (1938); *Legros v. Tarr*, 44 Ohio St. 3d 1, 540 N.E.2d 257 (1989).
[37] *Hummel* at 525.
[38] *Id*. at 528.
[39] *Hughes v. Oberholtzer*, 162 Ohio St. 330, 335, 123 N.E.2d 393 (1954).
[40] *Hummel*, 133 Ohio St. 520.
[41] *Hughes* at 333-337.
[42] *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179, 183, 465 N.E.2d 1298 (1984).
[43] Ohio Rev. Code Ann. § 2305.07.
[44] 2009-Ohio-2641 (7th Dist. 2009).
[45] *Id*. at ¶1.

filed an action in small claims court, for which the trial court appointed a magistrate for review.[46] Though the seller claimed that there was a written contract, the buyer denied this and the seller was not able to produce any written agreement to the magistrate or trial court.[47]

The magistrate found, and the trial court agreed, that there was no written contract between the parties and that as the seller was unjustly enriched from receiving and retaining the deposit money, said money must be returned to the buyer as restitution.[48] The seller appealed. The appellate court stated that there was no express contract included in the record, and went on to analyze the elements of quasi-contract.[49] The deposit money constituted a benefit given to the seller by the buyer, the seller was aware of this benefit, and, as the sale was not consummated, it would be unjust for the seller to retain the deposit.[50] Therefore, the appellate court affirmed the ruling of the magistrate and trial court, that the buyer was entitled to the return of his deposit.[51]

A similar result was reached in *Saber Healthcare Group, LLC v. Starkey*.[52] In *Starkey*, a buyer and seller orally agreed on the sale of a piece of real property for the price of $175,000.00, towards which the buyer made payments to the seller totaling $35,500.00.[53] After the seller refused to execute a written agreement for the sale, the buyer decided not to purchase the property.[54] The buyer, believing his payments to be a refundable down payment, demanded return of the same, but the seller refused, arguing that the payments were for an option to purchase the property and non-refundable.[55] The buyer filed a complaint against the seller on multiple counts, including unjust enrichment, and the seller filed a counterclaim for breach of contract.[56]

The trial court found in favor of the buyer on the unjust enrichment (quasi-contract) claim, and dismissed the seller's counterclaim.[57] The seller appealed, arguing, inter alia, that the trial court improperly found for the buyer on the unjust enrichment claim.[58] The Court analyzed the facts against the requirements of a quasi-contract claim, stating,

> Here, appellee conferred a benefit on appellant when, without taking possession of the house, it paid her $ 35,500 toward the West Main property. Appellant knowingly received these funds, and used them

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[46] *Id*.
[47] *Id*. ¶¶1-2. The seller did present a purported agreement to the appellate court, but the court held that, as such document was not presented to the magistrate or the trial court, it was not properly part of the record and could not be considered on appeal.
[48] *Id*.
[49] *Sammartino* at ¶¶14-15.
[50] *Id*.
[51] *Id*. at ¶15.
[52] 2010-Ohio-1778 (Ct. App. 6th Dist.).
[53] *Id*. at ¶9.
[54] *Id*. at ¶10.
[55] *Id.*
[56] *Id*. at ¶2.
[57] *Starkey* at ¶2.
[58] *Id*. at ¶15.

> toward paying down the mortgage on the West Main property she continued to possess.[59]

The Court ultimately found that "substantial justice was done" by the trial court's finding that the buyer was entitled to the refund of its $35,500.00 down payment and it affirmed that judgment.[60]

The more recent case of *Lehigh Gas-Ohio, LLC v. Cincy Oil Queen City, LLC*, analyzed the third "unjust enrichment" prong of the quasi-contract test in more detail.[61] In analyzing a claim under quasi-contract, the Court pointed out that proving the first two elements of a claim under quasi-contract was fairly simple, but whether it was "unjust" for one party to retain the "key money" paid by the other party for the opportunity to acquire a franchise gas station location was a more difficult question.[62] The Court stated that, "[i]t is not sufficient for the plaintiff to show that it has conferred a benefit upon the defendants. It must go further and show that under the circumstances it has superior equity so that, as against it, it would be unconscionable for the defendant to retain the benefit."[63] The Court determined that the retention of the money must be "unjustified," not just unequal in order for the plaintiff to prevail on the quasi-contract claim.[64] The Court then stated that, while the facts indicated that the agreement was perhaps unequal, the plaintiff did not prove that it had "superior equity" or that the defendant was "unjustified" in retaining the money.[65]

The logic and analysis present in *Sammartino* and *Starkey* may also apply to a recoupment case involving the DMA, such as the hypothetical scenario set forth above. Operator paid Lessor a bonus payment of $50,000, assuming that the law in existence at the time had resulted in a lapse of the Smith Interest and vested Lessor with the previously severed oil and gas. If Operator is able to show that its lease was void or otherwise unenforceable, it may be able to argue that it is entitled to a refund of the bonus payment under quasi-contract.

As described above, Operator must first show that there was a benefit or payment made to the Lessor and, second, it must show that the Lessor knew of the benefit or payment. Simply providing evidence that the bonus check was issued together with Lessor's presentment and cashing or depositing that check may suffice.

Lastly, Operator is required to show that the Lessor was unjustly enriched by the benefit or payment and/or from retention thereof. As *Lehigh* indicates, this is the more difficult prong to prove. Here, the Lessor originally received the bonus money and may have spent it on a new automobile, home improvements, or investments. This payment, however, was made in consideration for the return of a benefit to Operator, being the right to operate on the property and make a profit from the production and sale of oil or natural gas. As Operator can no longer operate on the property and, indeed, Lessor had no right to convey the right to operate, it would likely be unjust to allow the Lessor to retain a windfall where he or she gave nothing in exchange. Though this prong of the test may be difficult to establish, it is possible that Operator

[59] *Id*. at ¶16.
[60] *Id*. at ¶27.
[61] *Lehigh Gas-Ohio, LLC v. Cincy Oil Queen City, LLC*, 2016-Ohio-4611 (1st Dist. 2016).
[62] *Id*. at ¶19.
[63] *Id*. at ¶20, (internal citations and quotations removed).
[64] *Id*. at ¶¶20-21.
[65] *Id*. at ¶¶21-22.

could meet its burden of proof. If so, Operator would be successful in making a claim for quasi-contract and a court should require restitution in the form of a refund of the bonus payment.

(iv) Discharge of the Contract: Impracticability and Frustration of Purpose.

Arguing for discharge under frustration of purpose or the doctrine of impracticability (or impossibility), though unconventional, may also potentially provide operators an avenue to recover payments made to lessors to secure oil and gas leases that later fail. Frustration of purpose and impracticability come in different forms depending on whether the facts giving rise to the frustration or impracticability were in existence when the contract was executed. This discussion, however, will focus not on existing facts which cause impracticability or frustration, but on supervening facts or law which give rise to impracticability and frustration after contract formation.

Frustration of purpose occurs when "a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made," and "his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."[66] Similarly, "a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made," in which case "his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."[67] Given the similarity, frustration of purpose and impracticability are sometimes both argued in the same case. The remedy available is also the same for both: restitution.[68]

Case law on the frustration of purpose doctrine is limited in Ohio and it is not entirely clear that it can be used as in a cause of action (i.e., a sword), as opposed to a defense (i.e., a shield). However, there is at least one appellate case indicating that it is available as an affirmative claim. In *Wells v. C.J. Mahan Constr. Co.*, a widow and Executrix brought a claim against her deceased husband's former employer for breach of contract, frustration of purpose, and other claims.[69] At the trial level, the jury found in favor of the plaintiff on multiple claims, including the frustration of purpose claim.[70] On appeal, one of the company's assignments of error was that "[t]he trial court erred as a matter of law and abused its discretion in permitting the jury to consider and award damages for 'frustration of purpose' claims made by Plaintiff."[71] Though the Court pointed out that "the doctrine of frustration of purpose is not widely accepted in Ohio," it did not state that a claim for the same was prohibited or disallowed under Ohio law.[72] Rather, it analyzed the facts pertinent to the claim, and held that "the jury should not have considered and awarded damages for a frustration of purpose claim **under these**

[66] Restatement 2d Contracts, § 265 (Discharge by Supervening Frustration).
[67] Restatement 2d Contracts, § 261 (Discharge by Supervening Impracticability).
[68] Restatement 2d of Contracts, § 272.
[69] 2006-Ohio-1831 (Ct. App. 10th Dist.).
[70] *Id*. at ¶8.
[71] *Id*. at ¶9.
[72] *Id*. at ¶18.

circumstances."[73] This indicates that a frustration of purpose claim may be acceptable under other circumstances.

In a second case decided the same year as *Wells*, the Sixth Appellate District was also faced with an argument regarding the doctrine of frustration of purpose.[74] In this case, the defendant had been successful in a counter-claim against the plaintiff at the trial court.[75] The Plaintiff appealed claiming that "the trial court erred by not applying the doctrines of 'frustration of purpose, quasi contract, unjust enrichment, and quantum meruit'."[76] In its analysis, the Court stated that, "we must presume that appellant mentions the doctrine of frustration of purpose as a defense to appellee's counterclaim."[77] The Court did not state whether it felt this assumption was required because no claim of frustration of purpose existed, or if the only appropriate place to apply the doctrine in the instant matter was as a defense to the counterclaim. However, as the appellant did not set forth an argument in its brief regarding the application of the doctrine, the Court pointed out that the doctrine is disfavored in Ohio and ruled against the appellant/plaintiff in this assignment of error.[78]

In a more recent case, involving the transfer of real estate, the Franklin County Court of Common Pleas also dealt with an attempt to use the doctrine of frustration of purpose as a claim rather than a defense.[79] In *Mill Creek*, the parties entered into a contract for the sale of land which called for various non-refundable deposits, which the Plaintiff-Buyer had made.[80] Plaintiff-Buyer intended to use the land for a certain purpose, which was not stated in the contract itself, and refused to carry out the purchase when on-site and environmental inspections found issues which would prevent Plaintiff-Buyer from using the property for said purpose.[81] Plaintiff-Buyer then sued under various claims, including a declaratory judgment action to find "that the contract is unenforceable due to the doctrine of frustration of contractual purpose."[82] The Court cited to a 2010 Ohio case where a plaintiff had sued for breach of contract and the defendant attempted to use frustration of purpose as a defense.[83] The Court then stated that "frustration of purpose appears to be a defense to a claim for breach and not an affirmative method of obtaining relief."[84] Nevertheless, the Court went on to analyze the Plaintiff's claim under the doctrine. The Court found that the contract was unambiguous and did not mention the Plaintiff-Buyer's purpose for the property, leaving the only obvious purpose of the contract to be the purchase and sale of the property (regardless of its use).[85] As the environmental conditions did not prevent the Plaintiff-Buyer from purchasing the property or using it for other purposes,

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[73] *Id*. (emphasis added).
[74] *Donald Harris Law Firm v. Dwight-Killian*, 2006-Ohio-2347, 166 Ohio App. 3d 786, 853 N.E.2d 364.
[75] *Id*. at ¶7-9.
[76] *Id*. at ¶13.
[77] *Id*. at ¶17.
[78] *Id*.
[79] *Mill Creek Home Builders v. C-N & L*, No. 11 CVH 1232, 2012 Ohio Misc. LEXIS 15935 (Ohio Ct. Com. Pl. Apr. 25, 2012).
[80] *Id*. at 1.
[81] *Id*.
[82] *Id*. at 10.
[83] *Id*. at 10-11.
[84] *Id*.
[85] *Mill Creek* at 12-13.

the purpose of the contract was not frustrated and the Plaintiff was not entitled to the return of its deposit money.[86]

Similar to frustration of purpose, the doctrine of impracticability and impossibility are typically thought of as affirmative defenses used to prevent enforcement of a contract.[87] Impracticability, though often thought of as a somewhat lesser standard, is so closely tied to impossibility that the two are often analyzed as one.[88] Ohio also recognizes a specific variation of these doctrines allowing for the discharge of a contract which is made impossible or impracticable to carry out due to government action which prevents performance or makes it illegal.[89] "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made."[90] Again, similar to frustration of purpose, little case law exists where impracticability or impossibility is used as a cause of action, instead of a defense. However, at least one case exists where such a claim was successfully made.

In *Glickman*, a buyer and seller contracted for an option to purchase shares of a federally insured bank, which required the approval of the bank and of the Federal Reserve Board (the "FRB").[91] Under the option contract the buyer had a right to terminate but was only entitled to a refund of his option payment if he exercised his right to terminate on or before the date specified and "he may not legally purchase the shares."[92] After significant delay in obtaining approval from the bank and the FRB, buyer attempted to exercise his right to terminate the option contract and made a demand for the return of his deposit.[93] The seller refused to return the option payment and the buyer brought an action to recover the same, plus interest, attorney fees, and other expenses.[94] The trial court found in favor of the seller and the buyer appealed.[95]

The Eighth District Court of Appeals summarized that the issues before them were "(1) whether buyer had a right to terminate the option and recover his option payment, and (2) whether buyer exercised any right to terminate in a timely fashion."[96] The Court then discussed the termination rights and limitations in the contract, stating,

> The buyer's contractual right to terminate simply limited his common-law right to avoid the transaction on grounds of impracticability or impossibility of performance. Absent contrary contractual terms, either party can often avoid an agreement when governmental activity renders its performance impossible or illegal…Since the courts will not enforce an

[86] *Id*.
[87] *See, e.g. Chiaverini, Inc. v. GraBen, LLC*, 2014-Ohio-3542, 18 N.E.3d 762 (Ct. App.) (impracticability); *Gauthier v. Gauthier*, 2012-Ohio-3046 (Ct. App. 12th Dist.) (impossibility).
[88] *See, Bank One v. Marion*, CASE NO. 9-96-69, 1997 Ohio App. LEXIS 1601 (Ct. App. 3rd Dist.).
[89] *Glickman v. Coakley*, 22 Ohio App. 3d 49, 488 N.E.2d 906 (1984).
[90] Restatement 2d of contracts, § 264.
[91] *Id*.
[92] *Id*. at 50 (internal citations removed).
[93] *Id*.
[94] *Id*. at 51.
[95] *Id*.
[96] *Glickman* at 51.

> agreement to perform an illegal act, the parties presumably condition their contract on the legality of its performance.[97]

The Court then reviewed whether the contract's terms assigned to the buyer the risk of failing to obtain government approval. It found that the contract did put this risk on the buyer unless the buyer "(a)…made his best efforts to obtain governmental approval, (b) he could thereafter legally purchase the shares, and (c) he exercised the resulting ability to avoid his loss by giving timely notice of termination."[98] If the buyer met all of these conditions the risk was shifted to the seller. The Court held that the buyer had met the first two conditions and remanded the case for further determination of the last condition.[99]

In attempting to apply frustration of purpose or the doctrine of impracticability (or impossibility), an operator's biggest hurdle will likely be convincing the court that these claims are proper causes of action, and not only defenses to breach of contract. For frustration of purpose, there appears to be at least some willingness at the appellate court level to permit the theory as an independent cause of action.[100] However, there also appears to be reluctance or uncertainty, at least at the trial court level, as to whether the claim is viable.[101] *Glickman*, an appellate level case described above, also gives some indication that the application of the doctrine of impracticability as a cause of action may also be available.

In our hypothetical DMA scenario above, Operator paid Lessor a bonus payment of $50,000, assuming that the law in existence at the time had vested Lessor with the previously severed oil and gas. If Operator is able to convince a trial court that frustration of purpose or impracticability constitute an independent cause of action, the facts of the scenario fit well with the requirements these actions would pose. A typical oil and gas lease states that the purpose of the contract is for the operation, production, and sale of oil and gas extracted from the leased property. Certainly, if Operator can no longer extract the minerals from the leased property, its "principal purpose is substantially frustrated" and the contract is worthless.[102] Therefore, Operator should be entitled to restitution in the form of a refund of the bonus payment under the authorities cited above.

As mentioned earlier, the *Glickman* case dealt with a specific type of impracticability available in Ohio regarding intervening government action which would prevent performance of the contract or make it illegal.[103] When Operator entered into the lease and paid the bonus payment to Lessor, it assumed that the then-existing law would remain in effect and that, if anything, the Ohio Supreme Court would affirm that law. Given the unanticipated changes to the law governing application of the 1989 DMA, Operator can no longer lawfully enter the property and extract the minerals, as such action would likely constitute trespass. Therefore, the unexpected governmental action is preventing Operator's lawful performance of the lease, and it should be entitled to the return of its bonus payment as restitution.

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[97] *Id*. at 52. (internal citations removed).
[98] *Id*.
[99] *Id*. at 53-55.
[100] *See, Wells, supra*.
[101] *See, Mill Creek, supra*.
[102] *See*, Restatement 2d Contracts, § 265.
[103] 22 Ohio App. 3d 49.

(v) Contract Claims.

If an oil and gas lease, such as the one in the hypothetical DMA scenario above, is not void and not voidable at the option of one of the parties thereto, an operator may have to look to the lease itself to determine if and how it may recoup the bonus payment. It is well settled law in Ohio, that the rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument.[104] "Such leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties."[105] Therefore, courts will look to the language of the lease to determine the rights and duties of the parties.

It is important to note, that an oil and gas lease grants an operator a property interest in all the oil and gas underlying the property. The Ohio Supreme Court has recognized that oil and gas leases operate as more than a mere license and instead conveys a limited fee interests in lands for the purposes identified in the lease.[106] An oil and gas lease separated the surface estate in land, from the oil and gas estate, and conveys ownership of the oil and gas estate to the lessee.[107] The ownership in the oil and gas estate is a fee simple determinable because an oil and gas lease will eventually end due to the exhaustion of the oil and gas or abandonment of production.[108]

Generally, unless specifically waived, most leases contain clauses in which the lessor warrants title to the oil and gas under the land. Though the exact language may vary, one of the most common title clauses in oil and gas leases is a general warranty. Below is an example of a general warranty clause commonly found in oil and gas leases throughout Ohio:

> Lessor hereby warrants generally and agrees to defend title to the Leasehold and covenants that Lessee shall have quiet enjoyment hereunder and shall have benefit of the doctrine of after acquired title. Should any person having title to the Leasehold fail to execute this Lease, the Lease shall nevertheless be binding upon all persons who do execute it as Lessor. Lessor hereby warrants that Lessor is not currently receiving any bonus, rental, or royalty as a result of any other oil and gas lease covering any or all of the Leasehold, and that there are no producing or shut-in wells currently existing on the Leasehold, or upon other lands with the boundaries of a drilling or production unit utilizing all or a part of the Leasehold.

The Williams & Meyers treatises state that, "the rules concerning breach of covenant of title in an oil and gas lease are the same as those concerning breach of a covenant of title in other conveyances of interest in land."[109] A general warranty provides protection to the grantee if the grantor's title comes under attack after the transaction is completed. The grantor gives the

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[104] *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897).
[105] *Id*.
[106] *Kramer v. PAC Drilling Co.*, 197 Ohio App.3d 554, 2011-Ohio-6750, at ¶ 11, citing *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897).
[107] *Id*.
[108] *Id*.
[109] 4-6 Williams & Meyers, Oil and Gas Law § 685 (2016).

grantee both present and future guarantees that the title is good.[110] Ohio recognizes the present covenants of seisin, the right to convey, and the freedom from encumbrances.[111] As to the future covenants, Ohio recognizes the covenant of quite enjoyment and the covenant of further assurances.[112] Taken together these general warranties, reassure the operator that: i) the lessor has the estate that they purport to convey; ii) the lessor has the right to convey the property; iii) the operator will have quite enjoyment of the property, free of claims for outstanding interests; iv) the property is free from encumbrances; and v) the lessor will defend the title against the claims of all person.[113] Significantly, the above specimen warranty includes both an express covenant of quiet enjoyment and a warranty for title, which can be both independent and distinct promises. It is worth noting that we are assuming that the lessor had the present legal right to sign the lease, therefore, we are forgoing the analysis of whether the lessor breach the present covenants.

From the outset, we assume that the breach has caused the operator to be evicted from the land. It has long been established in Ohio, that to maintain an action as to the breach of the covenant of general warranty, that there must be an eviction. [114] The same rule applies regarding a covenant of quiet enjoyment. Such eviction however, may be either constructive or actual.[115] A constructive eviction occurs when "the acts of interference by the landlord compel the tenant to leave, and *** he is thus in effect disposed, though not forcibly deprived of possession."[116] William and Meyers states, "an eviction may be found where the lessee was never given possession or the right to possession."[117] In the present fact pattern, the eviction occurred on September 15, 2016, resulting in Operator's complete dispossession of any potentially beneficial use of the leasehold. Under what terms of the lease, if not set aside, does the Operator have any recourse against Lessor to make itself whole?

In Ohio, the covenant of quite enjoyment is breached whenever a landlord and or/ lessor of real property "obstructs, interferes with, or takes away from the tenant [and/or lessee] in a substantial degree the beneficial used of the leasehold."[118] The degree of impairment that a dispossessed operator has suffered is a question of fact. In our DMA scenario, Operator has suffered a complete loss of any rights in the lease after paying substantial consideration for the opportunity to develop the oil and gas. Significantly, our fact pattern offers no affirmative acts

[110] 10-188 Ohio Transaction Guide § 188.32 (2015).
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Innes v. Agnew*, 1 OHIO 386, 389, 1824 -Ohio LEXIS 67 (Ohio 1824).
[115] *Baughman v. Hower*, 56 Ohio App. 162, 168-169 (1937).
[116] *Sciascia v. Riverpark Apts* (1981), 3 Ohio App. 3rd 164, 166 444 N.E. 2d 40, citing *Liberal Savings & Loan Co. v. Frankel Realty Co* (1940), 137 Ohio St. 489, 499, 30 N,E, 2d 1012.
[117] 4-6 Williams & Meyers, Oil and Gas Law § 685 (2016); citing *Kline v. Guar. Oil Co.*, 167 Cal. 476 (1914) ("declaring that while generally eviction is required before an action for breach of covenant of quiet enjoyment may be maintained, eviction is not required where there has been no delivery of possession to the lessee"); *Knotts v. McGregor*, 47 W.Va. 566 (1900)("if at the time a conveyance with general warranty [including covenant of quiet enjoyment] is made the land is actually in the possession of a third party, holding the same under paramount title, this amounts to an eviction *eo instanti*"); and *Siniard v. Davis*, 1984 Ok. Civ. App. 13 (1984) ("A covenant of general warranty in a lease includes an obligation that the covenantor is seized in fee *with the right to convey* and if these covenants are broken, they are broken when made; eviction is unnecessary to consummate the breach.")
[118] *Howard v. Simon* (1984), 18 Ohio App. 3d 14, 16, 480 N.E.2d 99, citing *Frankel v. Steman* 91915), 92 Ohio St. 197, 200, 110 N.E. 747.

of interference by Lessor (i.e., locking the cattle gate to prevent access to a pad site). However, constructive eviction occurred as early as September 15, 2016 with the *Corban* rulings.

While the body of law in Ohio implicating the covenant of quiet enjoyment arises from traditional real property and landlord-tenant law, nothing prevents a court to borrow from this well-developed body of law and apply it to the realm of oil and gas leases. A review of the Supreme Court's rationale in *Foote v. Burnet* is extremely relevant to the issue and appears to be one of the cornerstone cases establishing a cause of action for the breach of the covenant of quiet enjoyment.[119] The Supreme Court held that the covenant of quiet enjoyment in a conveyance of an interest in land, "like the covenant of seizen, is made for the benefit of the grantee in respect to the land" and is "is intended for the security of all subsequent grantees" against claims by third-parties holding paramount interest, holding that the covenant of quiet enjoyment is an independent covenant apart from the warranty of title.[120] The Court then held that the measure of damages for a breach of covenant of quiet enjoyment is equal to the measure of damages "under the covenants of seizen and warranty" being the "consideration money, with interest and cost, and no more."[121] Therefore, Operator should be entitled to recover from Lessor as damages for its ouster from the leasehold, the initial consideration paid with interest and cost for Lessor's breach of the covenant of quiet enjoyment.

Ohio courts should extend the long established rational found in *Foote*, and its progeny, and align itself with other producing jurisdictions, as further discussed below, by permitting dispossessed operators to recover the initial consideration paid for the breach of the covenants contained in the contract, among other payments made under an oil and gas lease that later failed. A party who breaches a contract is liable for actual and consequential damages.[122] Courts have ruled that damages for the breach of a covenant of quiet enjoyment should fully and adequately compensate for the losses suffered. [123] To permit Operator to recover the consideration paid to Lessor ($50,000), is consistent with Ohio law permitting recoverable damages for breach of contract and breach of quiet enjoyment.

IV. Insights from other Jurisdictions.

(i) Statutory Remedies: Oklahoma and Louisiana.

Ohio courts may look to the jurisprudence from other producing jurisdictions in the case of a dispossessed operator. Oklahoma provides statutory remedies for "detriment caused by the breach of a covenant of seizing, of right to convey, of warranty, or of quiet enjoyment, in a grant of an estate in real property."[124] Assuming an oil and gas lease constitutes a grant of an estate in

[119] 10 Ohio 317 (1840).
[120] *Id*. at 332. See also, Williams & Meyers, Oil and Gas Law §685 (stating that the covenant of quite enjoyment is a "future" covenant that will "run with the land,").
[121] *Id*. at 335.
[122] *Telxon Corp v. Smart Media of Del., Inc*., 2005-Ohio-4931, 2005 Ohio App. Lexis 4475 (Ohio Ct. App., Summit County, September 21, 2005). See also *Catz Enterprises v. Valdes* 2009-Ohio-4962, 2009 Ohio App. Lexis 4203 (Ohio Ct. App., Mahoning County, Sept 17, 2009) ("The purpose of the remedy is to compensate the aggrieved party for losses actually suffered by the breach.").
[123] *Howard v. Simon*, 18 Ohio App. 3d 14, 8, 480 N.E. 2d99, 1984 Ohio App. Lexis 12475.
[124] 23 Okl. St. § 25.

real property, remedies for a breach of a lessor's general warranty or right to convey oil and gas, and breach of covenant of quiet enjoyment, include payment of:

> (1) The price paid to the grantor, or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore, at the time of the grant, to the value of the whole property.
>
> (2) Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding six (6) years; and
>
> (3) Any expenses properly incurred by the covenantee in defending his possession.

Oklahoma courts have held that ordinary oil and gas leases convey an interest in land such that the "measure of damages for breach of a covenant of an oil and gas lease [is] fixed by the statutory provision for breach in a grant of an estate in real property."[125] In an action for damages for breach of warranty, the lessee is entitled to recover such consideration that he has paid to the lessor, including the bonus payment and delay rental.[126] Oklahoma courts have even gone so far to hold that "[r]ecovery on the covenant of warranty will not be prevented by the fact that the lessor and lessee, or both of them, knew that the lessor had no title."[127]

In *Oklahoma City v. Harper*, the City, as lessor, entered into an oil and gas lease with the defendant covering the City's purported rights to the oil and gas underlying Draper Park. Upon later determining that the City *did not own the minerals*, but merely an easement, "Harper sued to recover the bonus money paid to Oklahoma City and prevailed," the Court holding that "Defendants in error are entitled to the return of the consideration paid for the lease, in view of the warranty and its breach, and this is based upon the fact that the city granted nothing by the lease which it executed and delivered under a warrant of its title to minerals in the land."[128]

In Louisiana, the provisions of the Louisiana Mineral Code control the rights and obligations of parties to an oil and gas lease, and in some cases, failed leases. Oil and gas leases are generally construed as ordinary leases under Louisiana law, but where provisions of the Mineral Code conflict with the Civil Code, the Mineral Code determines the effect of a Louisiana oil and gas lease.[129] Under the Mineral Code, a "mineral lessor warrants title to the interest he leases, and the lessee may recover the bonus paid for a lease if the warranty of title is breached."[130] A failure of title "is sufficient to obligate the seller to reimburse the buyer's purchase price under this provision" and the "sale of a mineral lease is subject to the laws of warranty" such that a "purchaser is entitled to the return of the price."[131] Under Louisiana Revised Statute Title 31 (Title 31 comprising the "Mineral Code"), Section 120,

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[125] *Melcher v. Camp*, 1967 OK 239, *P33 (1967).
[126] *Siniard v. Davis*, 1984 OK Civ App. 13, *P7 (Division One, 1984).
[127] *Id.*
[128] *Okla. City v. Harper*, 1947 Ok. 140, *P15 (1947).
[129] *Del-Ray Oil & Gas, Inc. v. Henderson Petroleum Corp.*, 797 F2d 1313 (5th Cir., 1986).
[130] *Id., citing* La. Rev. Stat. Ann. 31:120.
[131] *Id.*

> [a] mineral lessor impliedly warrants title to the interest leased unless such warranty is expressly excluded or limited. The liability of the lessor for breach of warranty is limited to recovery of money paid or other property or its value given to the lessor for execution or maintenance of the lease and any royalties delivered on production from the lease.

(ii) Kentucky.

In *New Domain Oil & Gas Co. v. McKinney*, the Kentucky Court of Appeals held that upon a breach of the covenant of title or for quiet enjoyment in an oil and gas lease resulting in eviction, "the measure of damages is the value of the land at the time of the execution of the instrument containing the covenants."[132] At the time of the lease in *McKinney*, bonus payments as inducement for lessors to execute lessors were not the market norm, only payment of royalties and rentals. The *McKinney* court evaluated a "peculiar feature of a partial failure of title," being the 1/7 interest of an infant/minor.[133] The Court held that the measure of damages for failed title was an amount equal to the "net value of the one-seventh of the oil produced after the filing of the suit" such that the "lessor will not be entitled to collect anything from his lessee."[134] The Court further reasoned that the purpose of the covenants of title and right to convey is "to restore to the covenantee what he loses by the breach, to the extent of the consideration."[135]

(iii) Texas.

The Court of Appeals of Texas, in *Chesapeake Exploration, L.L.C. v. Dallas Area Parkinsonism Soc., Inc.*,[136] determined that an operator is permitted a right of recovery to bonus money in the context of mutual mistake. In that case, Chesapeake entered into two oil and gas leases with Dallas Area Parkinsonism Society, Inc. ("DAPS") and the American Cancer Society High Plains Division, Inc. ("ACS") in 2007, pursuant to which they made payment of $498,000.[137] Subsequently, Chesapeake obtained a detailed drilling title opinion and discovered that neither DAPS nor ACS owned any interest in the property, and filed suit asserting actions for breach of the covenant of seisin, rescission of the leases due to mutual mistake, rescission of the leases due to Chesapeake's unilateral mistake, money had and received/unjust enrichment, and negligent misrepresentation.[138] DAPS and ACS filed a motion for summary judgment asserting a single ground for defeating all of Chesapeake's theories for recovery of the lease bonuses – Chesapeake accepted the leases from DAPS and ACS containing special warranties *which did not warrant title* (only that the charities had taken no action to encumber or divest title), but instead operated as the functional equivalent of a quitclaim deed. The trial court granted summary judgment to the charities.

Upon review, the Court of Appeals reversed, holding Chesapeake's claims for breach of the covenant of seisin, money had and received, unjust enrichment, recession and restitution

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[132] 188 Ky. 183 (1920).
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] Texas App. No. 07-10-0397, 2011 WL 3717082 (Aug. 24, 2011)
[137] *Id*. at *2.
[138] *Id*.

were not barred as a matter of law under the lessors' theory that Chesapeake bargained for and received the equivalent of a quitclaim deed.[139] The Court noted that a warranty deed to land conveys property while a quitclaim deed purports to convey the grantor's rights in that property, if any.[140] In deciding whether an instrument is merely a quitclaim deed, the courts look to whether the language of the instrument taken as a whole conveyed an interest in the property itself or merely the grantor's rights.[141]

Reviewing the language of the lease in that case, the Texas Court of Appeals noted the lease stated in exchange for consideration and the covenants contained therein, the lessor hereby *grants, leases, and lets exclusively* to the lessee the following described land for the purposes of exploring for, developing, producing and marketing oil and gas. The phrase was followed by a detailed description of the leased property and represented a present grant of a determinable fee interest in land.[142] Construing the lease as a whole, the court found the lease was not the equivalent of a quitclaim, reversed the summary judgment for the lessors, and allowed Chesapeake's claims for recovery of the bonus money to proceed.

Nothing prevents Ohio courts from borrowing from the settled law from other producing jurisdictions to determine unsettled oil and gas contractual issues, and in this case, how Operator may be permitted to recover on a meaningless oil and gas lease. Significantly, Ohio courts routinely rely on Texas law in several different oil and gas contexts, and may undoubtedly look beyond Texas on how to decide our hypothetical.[143]

V. Conclusion.

The new body of case law regarding Ohio's Dormant Mineral Act answered many questions with respect to the scope and applicability of that regime, but left many issues open for future debate. Operators, landowners, and the holders of severed mineral interests still question how to move forward, and, in some cases, how to make the best of a lost bet. If an operator is faced with a prototypical DMA scenario like our hypothetical above, how it approaches the recovery of payments made under a failed lease (if that decision is even reached) will depend on the facts of the particular case, the language of the lease, the applicable statute of limitations, and the parties' tolerance for litigation risk.

As a preliminary matter prior to making a claim, an operator may need to explore the question on whether its lease is void or still potentially enforceable. If the lease is not void, the

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[139] *Id.* at *5

[140] *Id.* at *4 (citing *Geodyne Energy Income Production v. The Newton Corp.*, 161 S.W.3d 482, 485 (Tex. 2005))

[141] *Id.* (noting language of a conveyance will be construed most strongly against the grantor and in favor of the grantee, so as to convey the greatest estate which the language used can be construed to pass).

[142] *Id.*

[143] *See e.g.*, *Morrison v. Petro Evaluation Servs., Inc.*, 5th Dist. Morrow No. 2004 CA 0004, 2005-Ohio-5640, ¶ 39 (looked to Texas law to define the phrase "capable of production"); *Blausey v. Stein*, 6th Dist. Ottawa No. OT-78-3, 1978 WL 214959, *4 (Dec. 8, 1978), *aff'd*, 61 Ohio St. 2d 264, 400 N.E.2d 408 (1980) (looked to Texas decisions on production in paying quantities); *Hupp v. Beck Energy Corp.*, 2014-Ohio-4255, 20 N.E.3d 732, (7th Dist.), ¶ 100, *appeal allowed*, 141 Ohio St. 3d 1454, 2015-Ohio-239, 23 N.E.3d 1196 (looked to Texas decisions on defining capable of production); *Kramer v. PAC Drilling Oil & Gas, L.L.C.*, 197 Ohio App.3d 554, 2011-Ohio-6750, 968 N.E.2d 64 (9th Dist.), ¶ 11 (looked to Texas decisions defining a leasehold interest).

contract may still be voidable if a court determines that the parties' made a mutual mistake as to the ownership of the oil and gas. If the lease is voidable, the operator may seek rescission and, barring the risk of mistake being allocated to the operator, may be successful in recouping the money it paid as a bonus. If the lease is not void or voidable, an operator may seek to enforce the various protective provisions within it, such as a general warranty clause and covenant of quiet enjoyment, further relying on other landowner representations and warranties, all designed to protect the lessee. As an operator's duty to perform is likely discharged in a situation like our scenario above, an operator may also attempt to seek restitution under the doctrines of impracticability and frustration of purpose. Finally, if the lease is void, or is declared void by a court, the operator may seek restitution under quasi-contract law relating to unjust enrichment. A court may consider other equitable remedies to enforce a lease, potentially reformation or novation of the lease by substituting in true owners of the oil and gas as lessors, and dismissing out the surface owner with failed title. The operator may lose value by paying a second bonus, but keep its lease.

As the potential for success of the above methods may vary, an operator should carefully consider all options given their exact situation. They may even wish to look to other jurisdictions in assisting them to determine the best course of action. Aside from potentially available legal theories, operators may also consider more practical concerns. Is the lessor collectible or judgment proof? Would landowner suits result in "bad press" lowering public opinion and support for continued operations? Regardless of how operators choose to move forward, there are bound to be challenges that come along with the possibility of the "reward" of recovering payments made on failed leases.